TAHAN STEEL CORPORATION SDN BHD

v.

BANK ISLAM MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: D4-22A-48-2003]
23 FEBRUARY 2004

CIVIL PROCEDURE: *Injunction - Interim injunction - Application to restrain defendant from enforcing security documents executed in tandem with Al-Istisnaa' facility agreements - Whether defendant would suffer irreparable damage if injunction granted - Exercise of court's discretion - Public policy - Whether factors were not in favour of granting injunction*

ISLAMIC LAW: *Islamic banking - Al-Istisnaa' facility agreements - Whether defendant had breached facility agreements - Whether plaintiff had failed to fulfil necessary condition of facility agreements - Whether defendant could enforce security documents executed in tandem with Al-Istisnaa' facility agreements*

BANKING: *Banks and banking business - Islamic banking - Al-Istisnaa' facility agreements - Whether defendant had breached facility agreements - Whether plaintiff had failed to fulfil necessary condition of facility agreements - Whether defendant could enforce security documents executed in tandem with Al-Istisnaa' facility agreements*

CONTRACT: *Breach - Fundamental breach - Islamic banking - Al-Istisnaa' facility agreements - Whether defendant had breached facility agreements - Whether plaintiff had failed to fulfil necessary condition of facility agreements - Whether defendant could enforce security documents executed in tandem with Al-Istisnaa' facility agreements*

This was an application by the plaintiff for an interim injunction restraining the defendant, a licensed Islamic bank, from enforcing security documents executed in tandem with an Al-Istisnaa' purchase agreement and an Al-Istisnaa' sale agreement ('the facility agreements') between the parties, until the determination of a writ action filed by the plaintiff for an alleged breach of contract by the defendant in relation to the facility agreements. The plaintiff was incorporated as a single purpose vehicle to undertake the development and construction of a Steckel Hot Strip Mill Plant to produce Hot Rolled Coils ('the said project') which was to be carried out on a piece of land valued at RM128 million ('the said land'). The plaintiff secured financing for the said

project from the defendant in the amount of RM97 million, and it was not in dispute that the defendant had released two tranches of the facility amounting in total to a sum of RM58,215,984.84 million. The plaintiff claimed that the defendant had fundamentally breached the facility agreements by its wrongful suspension of the drawdown of the RM97 million and had also wrongfully conducted itself in unilaterally purporting to re-write the terms of the facility agreements, and that by reason of these fundamental breaches, the defendant was not entitled to enforce the security documents against the plaintiff.

Held:

[1] The defendant had consistently maintained that the plaintiff had to secure financing from foreign EXIM banks and it was clear that this condition had been imposed on a sound commercial basis. The plaintiff was not entitled to depart from the requirement of the EXIM loan condition without the written and signed consent of the defendant, and on the facts, there was no evidence to show that the defendant had agreed in writing to vary the contract. The defendant was well within its rights to refuse to allow the disbursal of the third tranche of the facility to the plaintiff since the plaintiff had, by its own admission, failed to secure the EXIM loan. There was no legal duty on the part of the defendant to release any portion of the facility agreements. The plaintiff could not, and should not, claim that it had been wronged by the defendant when it was the plaintiff, in the first place, that had not complied with its part of the bargain. In short, the plaintiff had failed to perform the contract. (pp 43 a, c, 45 f, 50 g-h & 52 h)

[2] On the facts, the plaintiff would not be able to maintain the said project even if the injunction was granted to it. If the plaintiff could not even service the defendant's facility, which was only a small portion of the total financing required for the successful completion of the said project, it could definitely not service the EXIM loan which it would have to have for the successful completion of the project. Furthermore, the grant of an injunction to the plaintiff would cause irreparable damage to the defendant as the defendant, being a licensed Islamic bank, was not allowed to conduct any business contravening the Syariah, and thus, could not charge any interest for the plaintiff's late payments. In addition, the plaintiff's failure to demonstrate its ability to satisfy any undertaking as to damages alone should militate against this court from exercising its discretion in favour of the plaintiff in granting the injunction prayed for. The defendant, on the other hand, was a financially strong entity and its ability to satisfy any judgment could never be doubted. In the present case, even if the said

project could not be carried out of the said land, the said project may still be carried out on another suitably acquired piece of land at the expense of the defendant in the event that this court finds that the defendant had wrongfully withheld the disbursal of the facility agreements at the trial proper. (pp 56 e-g, 57 c, 58 h, 59 a-b & 60 a-b)

[3] In regard to public policy in the context of Islamic corporate financing, an injunction against the defendant would impede Islamic corporate financing. If the courts were quick to intervene, lenders like the defendant would shy away from lending to large commercial borrowers who were more likely to have the ability to seek such a remedy, and instead spread their risk with smaller lending to the ordinary man on the street. In this case, the defendant would be made to suffer loss of use of its money by the delay in recovering monies from the plaintiff in the event that this court ultimately decided that the injunction should not have been granted. The courts could not compensate this loss since the defendant was prevented by its strict adherence to Islamic banking principles from taking any penalty interest which would be in the nature of usury. Further, this court will not come to the aid of the plaintiff as the facts show that the plaintiff was already in breach of the facility agreements by being in default of the third quarterly payment, and had attempted to obtain an injunction against the defendant that simply wished to exercise its securities to recover the monies owed to it. (pp 60 c-e, 62 f-h & 63 a-c)

[Application dismissed.]

Case(s) referred to:

Adamastos Shipping Co Ltd v. Aglo Saxon Petroleum Co Ltd [1959] AC 133 ***(refd)***
American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***
Baldry v. Marshall [1925] 1 KB 260 ***(refd)***
Banque des Marchands de Moscou (Koupetschesky) v. Kindersley [1951] Ch 112 ***(refd)***
British Movietonews Ltd v. London and District Cinemas Ltd [1952] AC 166 ***(refd)***
Brodie v. Cardiff Corpn [1919] AC 337 ***(refd)***
Byrne v. Londonderry Tramway Co [1902] 2 IR 457 ***(refd)***
Causton v. Mann Egerton (Johnsons) Ltd [1974] 1 All ER 453 ***(refd)***
Chanter v. Hopkins [1838] 4 M & W 399 ***(refd)***
Charles Rickards Ltd v. Oppenhaim [1950] 1 KB 616 ***(refd)***
Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 MLJ 426 ***(refd)***
Consolidated Goldfields of South Africa Ltd v. E Spiegel & Co [1909] 25 TLR 275 ***(refd)***
Dennis v. AJ White & Co [1917] AC 479 ***(refd)***
Dering v. Earl of Winchelsea [1787] 1 Cox Eq 318 ***(refd)***
Duchess of Argyll v. Duke of Argyll [1967] Ch 302 ***(refd)***
Evans v. Bartlam [1937] AC 473 ***(refd)***

General Publicity Services Ltd v. Best's Brewery Co Ltd [1951] 2 TLR 875 ***(refd)***
FA Tamplin SS Co Ltd v. Anglo-Mexican Petroleum Products Co Ltd [1916] 2 AC 397 ***(refd)***
Harrison v. Wells [1967] 1 QB 263 ***(refd)***
Hoare v. Silverlock [1848] 12 QB 624 ***(refd)***
Ingram v. Percival [1969] 1 QB 548 ***(refd)***
Johnson v. Kearley [1908] 2 KB 514 ***(refd)***
Jones v. Lenthal [1669] 1 Ch Cas 154 ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***
Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 FC ***(refd)***
L French & Co v. Leeston Shipping Co [1922] 1 AC 451 ***(refd)***
Lee Soh Hua v. Kow Lup Piow & Ors [1984] 2 CLJ 85; [1984] 1 CLJ (Rep) 191 FC ***(refd)***
Lissenden v. CAV Bosch Ltd [1940] AC 412 ***(refd)***
Loughney v. Caledonian Rly Co [1902] 39 SC LR 289 ***(refd)***
Loughran v. Loughran [1934] 292 US 216 ***(refd)***
Lynch v. Thorne [1956] 1 All ER 744 ***(refd)***
Malaysia Shipyard and Engineering Sdn Bhd v. Bank Kerjasama Rakyat Malaysia Bhd [1985] 2 MLJ 359 ***(refd)***
Mega Air Conditioning Sdn Bhd v. Speedfam Co Ltd [2001] 4 CLJ 261 CA ***(refd)***
Miller v. Emcer Products Ltd [1956] Ch 304 ***(refd)***
Mills v. Dunham [1891] 1 Ch 576 ***(refd)***
Moody v. Cox [1917] 2 Ch 71 ***(refd)***
Multi-Purpose Bank Bhd v. Maimoon Abdul Razak [1999] 3 CLJ 21 HC ***(refd)***
Parker v. Gordon [1806] 7 East 385 ***(refd)***
Photo Production Ltd v. Securicor Ltd [1980] AC 827 ***(refd)***
Poussard v. Spiers and Pond [1876] 1 QBD 410 ***(refd)***
Re Morton, ex p Robertson [1875] LR 20 Eq 733 ***(refd)***
Re Nott and Cardiff Corpn [1918] 2 KB 146 ***(refd)***
Re Rosher, Rosher v. Rosher [1884] 26 Ch D 801 ***(refd)***
Reigate v. Union Manufacturing Co (Ramsbottom) [1918] 1 KB 592 ***(refd)***
Russell v. Duke of Norfolk [1949] 1 All ER 109 ***(refd)***
Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd & Ors [2003] EWHC 2118 (Comm) ***(refd)***
Smith v. Baker [1873] LR 8 CP 350 ***(refd)***
Tan Chong & Sons Co Sdn Bhd v. Alan Mcknight [1983] 1 CLJ 77; [1983] CLJ (Rep) 394 FC ***(refd)***
Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors [2002] 2 CLJ 758 HC ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***
Tramways Advertising Pty Ltd v. Luna Park (NSW) Ltd [1938] 38 SR ***(refd)***
TSC Education Sdn Bhd v. Kolej Yayasan Pelajaran MARA & Anor [2002] 2 CLJ 581 HC ***(refd)***

Univein Sdn Bhd v. Malaysia Building Society Bhd [2003] 2 CLJ 514 CA ***(refd)***
Wilkins v. Jadis [1831] 2 B & Ad 188 ***(refd)***
Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No 4) [1998] 4 CLJ Supp 319 HC ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, ss. 2(1), 124, 126
Central Bank of Malaysia Act 1958, s. 16B(8)
Evidence Act 1950, s. 92
Islamic Banking Act 1983, s. 2

Other source(s) referred to:
Abdullah Yusuf Ali, *The Holy Qur'an*, Text Translation and Commentary, p 115, Surah 2:275, 2:276, Al Baqarah

For the plaintiff - Gananathan Pathmanathan (Olivia Loh Yuet Ling); M/s Bodipalar Ponnudurai Nathan
For the defendant - Md Tajuddin Md Isa (Selva Kumaran); M/s Md Tajuddin & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

The Al-istisnaa' Facility Agreements – The Islamic Banking

The Islamic Banking Act 1983 is an interesting piece of legislation. By way of s. 2 thereof, the following germane definitions appear:

> 'Islamic bank' means any company which carries on Islamic banking business and holds a valid licence and all the offices and branches in Malaysia of such a bank shall be deemed to be one bank; and
>
> 'Islamic banking business' means banking business whose aims and operations do not involve any element which is not approved by the Religion of Islam.

By way of a comparison, reference should be made to the Banking and Financial Institutions Act 1989 ("BAFIA") where by way of s. 2(1) thereof, "banking business" has been defined to mean:

> (a) the business of:
>
> (i) receiving deposits on current account, deposit account, savings account or other similar account;
>
> (ii) paying or collecting cheques drawn by or paid in by customers; and
>
> (iii) provision of finance; or
>
> (b) such other business as the Bank (referring to Bank Negara Malaysia), with the approval of the Minister, may prescribe; …

By now, Malaysians are familiar with the concept of interest free banking that is offered by the defendant – Bank Islam Malaysia Berhad. The defendant offers what is now known as the "skim perbankan tanpa faedah". Translated into the English language it means an "interest-free banking scheme". It is common knowledge that the defendant commenced operations on 1 July 1983 and it is now a force to be reckoned with. In the context of this case, the defendant bank provides the Al-Istisnaa' facility to the plaintiff company.

The defendant has a website *vide* wysiwyg://14/http://www. bankislam.com.my and in that website Istisnaa' is simply defined as a sale by order.

What then is Islamic banking? According to the write-ups by the Central Bank of Malaysia – Bank Negara Malaysia, that is easily available in the market, an Islamic Banking is defined as follows:

> … a banking activity that is based on Syariah principles. It does not allow the paying and receiving of interest and (it) promotes profit sharing in the conduct of banking business.

The write-ups continue in these solemn words:

> The basic principle of Islamic banking is the sharing of profit and loss and the prohibition of riba' (interest).

It is interesting to note that Bank Negara Malaysia – the Central Bank of Malaysia, has a website and it is listed as www.bankinginfo.com.my. Anyone can log on to it. And I can take judicial notice of it. Indeed I can take judicial notice of almost everything. Thus, it is permissible for me to take judicial notice of those matters which men of ordinary and average intelligence would be acquainted with (*Byrne v. Londonderry Tramway Co* [1902] 2 IR 457 at 480; *Loughney v. Caledonian Rly Co* [1902] 39 SC LR 289; and *Hoare v. Silverlock* [1848] 12 QB 624 at 633). It is also permissible for me to take judicial notice of how certain businesses are being carried out. It would not be out of place for me to take judicial notice of the following state of affairs:

(a) as to the normal banking hours (*Parker v. Gordon* [1806] 7 East 385; and *Wilkins v. Jadis* [1831] 2 B & Ad 188);

(b) as to how a broker would function at the stock exchange (*Johnson v. Kearley* [1908] 2 KB 514 at 528, CA);

(c) as to the common practice of legal practitioners who specialise in conveyancing (*Re Rosher, Rosher v. Rosher* [1884] 26 Ch D 801); and

(d) as to the risks peculiar to certain trades (*Dennis v. A.J. White & Co* [1917] AC 479 at 491, 492, HL).

Generally speaking, I can rely on my own knowledge of the local affairs (*Ingram v. Percival* [1969] 1 QB 548, [1968] 3 All ER 657). Those who are computer literate would certainly log on to the website to garner knowledge and information. And this I can surely take judicial notice of.

Now, the Central Bank of Malaysia Act 1958 (Act 519) was recently amended by the Central Bank of Malaysia (Amendment) Act 2003 (Act A 1213) which was given its Royal Assent on 22 December 2003 and it was published in the Gazette on 31 December 2003. That amendment brought with it the new s. 16B which brings into the fold the establishment of the Syariah Advisory Council. Sub-section (8) of the new s. 16B enacts as follows:

> Where in any proceedings relating to Islamic banking business, takaful business, Islamic financial business, Islamic development financial business, or any other business which is based on Syariah principles and is supervised and regulated by the Bank before any court or arbitrator any question arises concerning a Syariah matter, the court or the arbitrator, as the case may be, may:
>
> (a) take into consideration any written directives issued by the Bank pursuant to sub-section (7); or
>
> (b) refer such question to the Syariah Advisory Council for its ruling.

That would be food for thought. But in the context of adjudicating encl. 2, the ruling of the Syariah Advisory Council was not sought after. Perhaps the parties knew that the whole banking transaction in the present case was Islamic in nature.

It is pertinent to point out that s. 124 of the BAFIA stipulates that the BAFIA shall not apply to an Islamic Bank. Why is this so? Perhaps the legislature has intended that no part of the Islamic banking business should fall within the purview of the BAFIA. It must be borne in mind that BAFIA was enacted after the Islamic Banking Act 1983. But it is baffling that s. 126 of the BAFIA is enacted in this fashion:

> The Bank (referring to Bank Negara Malaysia) or the Minister (referring to the Minister of Finance) may generally in respect of any particular provision of this Act, or generally in respect of the conduct of all or any of the licensed or scheduled businesses, issue such guidelines, circulars or notes as the Bank (referring to Bank Negara Malaysia) or the Minister (referring to the Minister of Finance) may consider desirable.

Could it be that the power given to Bank Negara Malaysia – the Central Bank of Malaysia, or the Minister of Finance to issue guidelines under s. 126 of the BAFIA are limited in its scope or that no guidelines can be issued under the BAFIA in respect of Islamic banking because such guidelines would be *ultra vires* the BAFIA and, consequently, it would be *void ab initio* (*Malaysia Shipyard And Engineering Sdn Bhd v. Bank Kerjasama Rakyat Malaysia Bhd* [1985] 2 MLJ 359, SC)? Alternatively, can it be said that the guidelines issued by Bank Negara Malaysia – the Central Bank of Malaysia, or the Minister of Finance under s. 126 of the BAFIA have no force of law? These are certainly interesting pointers that should be ventilated at another forum. Perhaps legislative amendments should be examined by the draftsman.

Recently in England in the case of *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd and others* (2003) EWHC 2118 (Comm), (2003) 2 All ER (Comm) 849 *vide* website: Legal > Legal (excluding US) > Commonwealth > Case Law > England and Wales Reported and Unreported Cases, Morison J. considered the conflict of laws between Islamic law and the English law. The headnote to that case makes for an interesting reading material and there it states:

> The claimant bank, which was incorporated under the laws of Bahrain, operated under the principles of Sharia'a law as an Islamic financial institution. The commercial activities of the bank were supervised by a board of distinguished Islamic scholars to ensure that they were conducted in accordance with Sharia'a principles. The bank and the first and second defendants had entered into `Morabaha' financing agreements, by which the first defendant agreed to buy certain goods from the bank for a price, payable in instalments, which included a profit element. The second defendant was appointed by the bank as its agent for the purchase of the goods. Effectively, therefore, the bank advanced funds to the defendants and repayments including profit were to be made over a period. The parties had conferred on the English courts jurisdiction over proceedings `arising out of or in connection with this agreement' and expressed their choice of law as follows: 'Subject to the principles of Glorious Sharia'a, this agreement shall be governed by and construed in accordance with the laws of England.' The defendants defaulted on the agreements and the bank issued proceedings in the English court. The defendants argued, inter alia, that, by virtue of the governing law clause, the obligations on them were enforceable only if they were enforceable both under Sharia'a law and English law; and that the 'Morabaha' agreements were merely a disguise for interest-bearing loans, which were not enforceable under Sharia'a law. The bank applied for summary judgment, contending that the words 'Subject to the principles of Glorious Sharia'a' were not a choice of law but a reference to the fact that the bank sought to conduct its affairs according to Sharia'a principles. The bank further drew attention to art 3(1) (Article 3(1) is set at [27], below) of the Rome Convention on the Law

Applicable to Contractual Obligations 1980 (as set out in Sch 1 to the Contracts (Applicable Law) Act 1990), which stated that a contract 'shall be governed by the law chosen by the parties', and to art 1(1) of the convention, which provided that the rules of the convention applied to contractual obligations involving a choice between 'the laws of different countries'.

Morison J held as follows (again reference to the headnote is made):

It could not have been the intention of the parties to ask a secular court to determine principles of law derived from religious writings on matters of great controversy. The English court, as a secular court, was not suited to ascertaining and determining highly controversial principles of a law based on religion, and it was unlikely that the parties would be satisfied by such a ruling. That was especially so since the bank had its own religious board to monitor compliance with the board's own perception of Islamic principles of law in an international banking context. Furthermore, the Rome Convention, by art 1(1), sanctioned only the choice of law of a country, and not that of a non-national legal system: in such a case art 3 of the convention could not apply. Although it was not possible to contract out of the convention, that did not mean that parties could not by agreement incorporate special provisions suggested by or consonant with religious or other moral principle. However, such parties could not require the English court to adjudicate their contractual disputes according to such principles independently of the national law which was otherwise, by operation of the Rome Convention, binding on the parties to the contract. Although the court was well used to disputes about foreign law and would, if necessary, determine what a judge in a foreign court would decide had he or she received submissions on Islamic law, that was not the same exercise as determining what, as a matter of English law or applying English law principles, the principles of a law based on religion were. Moreover, there was no suggestion that the defendants were in any way concerned about the principles of Sharia'a law either at the time the agreement was made or at any time before the proceedings were started. The Sharia'a law defence was a lawyers' construct which did not work. Accordingly, judgment would be given for the bank (see [27], [34]-[37], [39], [40], below).

The decision of Morison J was confirmed on appeal by the Court of Appeal (Potter, Laws and Arden LJJ). Potter LJ delivered the judgment of the Court of Appeal (2004) EWCA CIV 19, (2004) All ER (D) 280 (Jan) (approved judgment) *vide* the same website source.

It is interesting to note that Morison J recognised that:

The English court, as a secular court, is not suited to ascertain and determine highly controversial principles of a religious-based law and it is unlikely that the parties would be satisfied by any such ruling; that is not what they were wanting by their choice of law clause.

And so it was not surprising when Morison J said:

> [24] They say that the words 'Glorious Sharia'a principles' are a reference to religious principles rather than to a choice of a coherent system of law. There is, they submitted, the greatest controversy, as shown by the evidence, between experts and indeed between Islamic courts, as to the 'true' principles. And, given that controversy, it is highly improbable that the parties intended an English court to determine difficult questions of the Sharia'a principles. As Dr Lau points out in his first expert report, Sharia'a law is made up of conflicting pronouncements and there is a considerable debate as to what is and what is not permissible under it. The situation is complicated by the fact that much of the classical law emerged at a time when many financial concepts simply did not exist. It is because of these systemic uncertainties and controversies that Islamic banks submit themselves to the supervision and scrutiny of religious supervisory boards.

In serious vein, Morison J said that:

> [38] Sharia'a principles are not simply 'principles of law' but are principles which apply to other aspects of life and behaviour. Sharia'a means, I am told, 'orthodox'. Sharia'a law is the law laid down by the Qur'an and the Sunna (which contain the sayings, teachings and actions of the prophet Mohammed) and the only way to know this is through the collection of Ahadith which consists of reports about the sayings, deeds and reactions of the prophet.
>
> [39] Whilst in one sense this court will answer any question posed of it, however difficult, it is improbable, in the extreme, that the parties were truly asking this court to get into matters of Islamic religion and orthodoxy. This is a especially so when the bank has its own religious board to monitor the compliance of the bank with the board's own perception of Islamic principles of law in an international banking context.

Morison J recognised that the defence was the brainchild of the counsel for the defence when his Lordship said:

> The Sharia'a law defence is, I think, a lawyers' construct but, for the reasons I have given, in my view it does not work.

With respect, as a Malaysian Judge, I do not agree with the views of Morison J when his Lordship after relying on Dr. Lau's first expert report said that:

> … Sharia'a law is made up of conflicting pronouncements and there is a considerable debate as to what is and what is not permissible under it. The situation is complicated by the fact that much of the classical law emerged at a time when many financial concepts simply did not exist.

It must be borne in mind that whenever there is a conflict, reference should be made to the Qur'an (the holy book of Islam) and the Sunnah (the sayings, teachings and actions of the Prophet Mohammad). Tan Sri Nor Mohamed Yakcop, the Second Minister of Finance (as he then was) in his paper entitled "Reflections on the Islamic Financial System" (courtesy of the Central Bank of Malaysia and made available on request) aptly said:

> If we are to look at the Islamic financial system, it is natural that we look at the core of Islam itself. Unlike many other religious systems, we see Islam as a deen, or as a complete way of life. Beyond basic religious beliefs and practices, Islam shows us how to best conduct ourselves in everyday matters. This code of best conduct is called the Shariah, and it is the basis of the Islamic financial system.
>
> But the Shariah has been put there not as a set of rituals to make life difficult. It serves several important purposes. Firstly, the Shariah is a means for us to approach and seek the pleasure of the Creator. Secondly, a positive side effect of complying with Shariah is that it brings about human success and harmony – allowing man to attain excellence. It is through the strong adherence of the Shariah that the Muslims of earlier generations achieved their magnificence and global success. Thus, the Islamic financial system, being a part of this Shariah system, ought to be treated in the same light.
>
> Just as the Shariah is a means to an end, so too is the Islamic financial system. The implementation of an Islamic financial system is not the end goal. It is, in fact, a means and a tool of competitive advantage for the Ummah's success, including economic success.

Dato' Dr. Abdul Halim Ismail, the Executive Chairman of BIMB Securities Sdn Bhd in his paper entitled "Islamic Banking: How Developed Is It In Malaysia Today?" that was presented at ILKAP (Institut Latihan Kehakiman & Perundangan) (courtesy of the Central Bank of Malaysia and made available on request) aptly said that:

> Muslims have found that substantial parts of the operation of the western conventional banking and financial system are not in line with the rules of Shari'ah or Islamic Jurisprudence. In banking, in particular, interest which is charged and paid in all lending contracts is deemed to be al-Riba which is strictly forbidden (haram) in Islam.

So much for the brief and necessary digressions. A bird's eye view of the Islamic banking system must be laid out in its correct perspective.

Enclosure 2

The plaintiff filed an application *vide* summons in chambers in encl. 2 seeking, *inter alia*, for an interim injunction against the defendant on the following terms:

(a) the Defendant by itself, its agents, servants or howsoever otherwise be restrained and an injunction be issued restraining the Defendant from acting on, placing reliance or enforcing the security documents as against the Plaintiff which were executed in tandem with the Al-Istisnaa' Purchase Agreement dated 15.4.2001 and the Al-Istisnaa' Sale Agreement dated 15.4.2001 ('the Al-Istisnaa' Facility Agreements'), which security documents executed on 15.4.2001 comprise of and include the following:

(i) the Deed of Assignment in respect of the said Land;

(ii) the Debenture;

(iii) the Corporate Guarantee;

(iv) the Directors' Guarantee;

(v) the Memorandum of Deposit of Investment Account Certificate executed by the Plaintiff in favour of the Defendant over RM1,000,000.00;

(vi) the Deed of Assignment on insurance taken out in respect of the said Project;

(vii) the Deed of Assignment of Performance Bonds taken out in respect of the said Project;

(viii) the Shareholder of Support Agreement;

(ix) the Shareholder's Undertaking.

('the Security Documents');

(b) costs of and occasioned by this application be provided for;

(c) such other or further relief which this Honourable Court deems fit and proper.

It will be seen later that the security documents play an important role in this case.

Before filing encl. 2, the plaintiff had filed a writ together with the statement of claim as seen in enclosure one (1) against the defendant alleging breach of contract on the part of the defendant. Essentially, by way of encl. 2, the plaintiff seeks by way of an interim injunction to prevent the defendant from exercising its lawful rights under the security documents executed by the plaintiff in favour of the defendant pending the outcome of the writ action.

The grounds supporting the application in encl. 2 may be stated as follows:

(a) that the Defendant has acted in fundamental breach of the Al-Istisnaa' Facility Agreements by its wrongful conduct in unilaterally imposing fresh terms and conditions not intended by the parties and by unlawfully suspending further drawdown on the facilities of RM97,000,000.00;

(b) the Plaintiff has treated the said fundamental breaches as constituting a repudiation of the Al-Istisnaa' Facility Agreements and has accepted the repudiation;

(c) the Al-Istisnaa' Facility Agreements is at an end and by reason of the fundamental breaches as aforesaid, the Defendant is not entitled to enforce the Security Documents as against the Plaintiff;

(d) unless injuncted, the Defendant threatens to enforce the Security Documents as against the Plaintiff;

(e) other grounds as set out in the Affidavit affirmed by Lee Kean Binh on 7.5.2003 and filed herein.

The Arguments Of The Plaintiff

The plaintiff's claim in the action herein is essentially that the defendant bank fundamentally breached the Al-Istisnaa' facility agreements by its wrongful suspension of the drawdown of the RM97 million and the defendant bank's wrongful conduct in unilaterally purporting to re-write the terms of the Al-Istisnaa' facility agreements.

The plaintiff argues that it has accepted the defendant's repudiation of the Al-Istisnaa' facility agreements and the plaintiff contends that it is discharged from its obligations and no longer bound by the said agreements. The plaintiff further argues that notwithstanding such fundamental breach and acceptance of the repudiation by the plaintiff, the defendant has purported to enforce the security documents executed in tandem with the Al-Istisnaa' facility agreements against the plaintiff. It is the contention of the plaintiff that the defendant by reason of its fundamental breaches and termination of the Al-Istisnaa' facility agreements is not entitled to act upon, nor place reliance nor enforce the security documents against the plaintiff.

The Arguments Of The Defendant Bank

The defendant is contesting enclosure 2 and argues that the plaintiff is not entitled to the injunction for the following reasons:

(a) that there is no serious issue to be tried once the court looks closely at the express written agreements between the parties;

(b) that the plaintiff company by their own admissions, is not in a position to actually satisfy any undertaking as to damages;

(c) that the plaintiff would be adequately compensated by damages in the unlikely event that the defendant is found to be in breach of the written contract; and

(d) that the balance of convenience after taking into account, *inter alia*, the above factors and the fact that the defendant carries on its business according to the Islamic financing model, lies in not granting the injunction since the defendant will suffer irrecoverable losses if it is unable to collect back the monies it has extended to the plaintiff according to the original agreed schedule of payment since it is not allowed to collect interest on late payment.

It is the stand of the defendant that the alleged breach of contract by the defendant are non-existent and are, in fact, breaches of the terms implied by the plaintiff unilaterally and these implied terms are inconsistent with the express written agreements which provide, *inter alia*, that:

(i) any variation needs to be in writing; and

(ii) that any waiver on the part of the defendant does not preclude the defendant from insisting on its strict legal rights.

It is also the stand of the defendant that:

(i) the argument based on implied terms are not acceptable since the implied terms cannot overrule the express terms and in any event they are not necessary nor should they be implied in law;

(ii) the defendant's acceptance of the plaintiff's wrongful repudiation is valid in law;

(iii) the quantification of damages is a non issue since it is agreed and provided for in the security documents; and

(iv) the doctrine of estoppel should not be invoked in favour of the plaintiff.

The Facts

The plaintiff was incorporated as a single purpose vehicle to undertake the development and construction of a Steckel Hot Strip Mill Plant to produce Hot Rolled Coils (hereinafter referred to as the "said project"). It is said that the said project is of great public and national importance. The plaintiff proudly makes reference to exh. "P3" annexed to encl. 3 where the following averment appears:

> We are pleased to mention that Dato' Tai E King and the undersigned have personally briefed our beloved Prime Minister Datuk Seri Dr. Mahathir Mohammad about our Hot Strip Mill Project in 1997 and again on 7 February 2000 at Sri Cahaya and have received full endorsement from our Prime Minister.

At all material times, the said project was to be carried out on a piece of land measuring approximately 119 acres in Klang. That land was purchased by the plaintiff from the Selangor State Development Council for the sole purpose of the said project and this is reflected in the Al-Istisnaa' facility agreements. The valuation report by Kumpulan Jurunilai Sdn Bhd dated 16 January 2001 shows that the said land is of a leasehold interest of 99 years and it is valued free from legal encumbrances and with vacant possession at RM128 million (see exh. "P21" of encl. 10).

The plaintiff secured financing for the said project from the defendant bank. This is reflected in the contract between the two parties on 15 April 2001 based on the security documents as alluded to earlier. And based on the security documents, the defendant bank as a financier and using the Syariah principles had agreed to make available to the plaintiff company a financing facility of RM97 million. It is not in dispute that the defendant bank had released two tranches of the facility amounting in total to a sum of RM58,215,984.84 million.

Now, under the Al-Istisnaa' concept, the defendant purchased the said project from the plaintiff for a purchase price of RM97 million which is disbursed immediately into a financing payable account. From such account the monies are paid out to the plaintiff upon the latter meeting all the conditions contained in the Al-Istisnaa' purchase agreement. Concurrently with the execution of the Al-Istisnaa' purchase agreement, the defendant sold back the said project to the plaintiff by way of the Al-Istisnaa' sale agreement for an agreed price comprising the purchase price together with an agreed profit margin.

The plaintiff's primary complaint is this. That the defendant has refused to release the balance of the facility amounting to RM38,784,015.16 million from the financing payable account. In my considered view, whether the defendant is lawfully entitled to withhold the disbursal of the third tranche must be tested in reference to the contemporaneous documents containing the written agreements between the parties. It cannot, with respect, be tested against strained implied terms nor based on non-contractual documents created by one party only. To do so would be to fly in the face of the basic concept of "ad idem" which is a basic tenet of contract law. A contract is a legally enforceable agreement giving rise to obligations for the parties to adhere to and for the courts to enforce it. The agreement requires a meeting of the minds between the contracting parties and this is described as a consensus *ad idem*.

The Legal Tests As Enunciated By The Courts

The locus classicus of the American Cyanamid (the case of *American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316) has been distilled by the Court of Appeal in the case of *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 CA, and it has also been referred to by me in the case of *Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No: 4)* [1998] 4 CLJ Supp 319 where I said:

> I have painstakingly followed the guidelines set out by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & Ors* [1995] 1 CLJ 293, in tackling encl. 6 particularly the three approaches enunciated by his Lordship which were as follows:
>
> > To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
> >
> > First, he must ask himself whether the totality of the facts presented before him disclose a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand, if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;
> >
> > Secondly, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he

would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee;

Thirdly, the judge must have, in the forefront of his mind, that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Floods Ltd v. Milk Marketing Board* [1948] AC 130 and applied in *Cheng Hang Guan.* It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

In the context of this case, the three tests will be examined and they may conveniently be classified as:

(i) the "serious issues to be tried" test in relation to the first paragraph of the speech of Gopal Sri Ram JCA in the *Keet Gerald Francis* case;

(ii) the "balance of convenience" test in relation to the second paragraph of the speech of Gopal Sri Ram JCA in the *Keet Gerald Francis* case; and

(iii) the "discretionary" test in relation to the third paragraph of the speech of Gopal Sri Ram JCA in the *Keet Gerald Francis* case.

The Serious Issues To Be Tried

I have set out the facts of the case and it is now my duty to examine the arguments of the parties raised under this head.

What Is The Obligation On The Part Of The Defendant To Release The Monies To The Plaintiff?

The answer is not far to seek. Reference must, of course, be made to

the Al-Istisnaa' purchase agreement as seen in exh. "P5" of encl. 3 which is the plaintiff's affidavit in support entitled "Affidavit Pertama Plaintif (Bagi Menyokong Injunksi) yang diikrarkan oleh Lee Kean Binh on 7 May 2003 volumes 1 and 2" (hereinafter referred to as the "plaintiff's first affidavit"). Now, cl. 5.1 of exh. P5 of the plaintiff's first affidavit sets out twenty three (23) conditions that have to be met before the defendant is obliged to disburse the facility to the plaintiff. To my mind, the most contentious of these twenty three (23) conditions would be item 5.1 (v) which states as follows (hereinafter referred to as the "EXIM loan"):

> The customer shall have submitted evidence satisfactory to the bank that it has secured facilities totalling approximately USD 80 million or such other amount as the bank reasonably determines from foreign EXIM banks for the purpose of part financing of the project.

Securing the EXIM loan from foreign EXIM banks is also a condition which the plaintiff emphasises in its dealings with the defendant. Thus, the plaintiff in their proposal to the defendant before the facility was granted had in a letter dated 24 April 2000 exhibited as exh. P3 to the plaintiff's first affidavit at p. 103 to p. 113 categorically stated at p. 108, item (v) (1) the following:

> TSC (referring to the plaintiff) has the liberty to secure from Oesterreichische Kontrollbank AG (OeKB) of Austria under the Export Financing scheme for the total imported portion of the plant and equipment for US$93.1 million or 85% of US$109.5 million from Austria and Germany (denominated in Euro currency).

It is quite apparent that the plaintiff's proposal to secure the EXIM loan from foreign EXIM banks plays a significant part before the defendant grants the Al-Istisnaa' facility. Even the letter of offer of the loan facility contains this apt condition. That letter of offer dated 10 November 2000 as exhibited as exh. "P4" to the plaintiff's first affidavit at pp. 114 to 122, particularly at p. 115 at item 12 (v) carries this message:

> Evidence showing that TSC (referring to the plaintiff) has secured about USD$80 million from foreign EXIM banks subject further to Euro Dollar against USD at that moment of time. (The above is calculated based on Euro 104.55 million x USD 0.9 x 85%).

It has always been consistently maintained by the defendant that the plaintiff has to secure financing from foreign EXIM banks. That would be the stand of the defendant and this is reflected in the defendant's affidavit in reply affirmed by Asnulhadi bin Yeop Aziz on 22 May 2003 (hereinafter referred to as the "defendant's affidavit"). Paragraph 13 of the defendant's affidavit advances the reason as to why the plaintiff ought to secure financing from foreign EXIM banks and it is worded in this way:

> The defendant's financing facility to the plaintiff was small compared to the overall cost of completing the project which was estimated at RM806.8 million. Therefore if the plaintiff failed to raise financing for the balance of the project cost, the completion of the project was in doubt. This would definitely affect the plaintiff's ability to repay the facility given by the defendant.

It is correctly submitted that the defendant had imposed this condition on a sound commercial basis. It is with respect, not whimsical nor belligerent. The plaintiff has been made aware of this condition at all times.

The Contracts Act 1950 is not a complete statute. It does not contain any provision which deals with the contents of a contract. It too does not contain any provision as to whether the parties are strictly bound by the express terms of the contract or whether certain terms may be implied. The Contracts Act 1950 is also silent as to whether evidence may be admitted to add, vary or even to contradict a written contract. But our courts have been bold and forward looking. It has shaped the law by following the common law. But the general rule has always been that:

> … where the terms of a contract … have been reduced by consent of the parties to the form of a document …. no evidence shall be given in proof of the terms of the contract …

But we must also take heed of s. 92 of the Evidence Act 1950 which excludes the admission of oral evidence for the purpose of contradicting, varying, adding to, or even subtracting from the terms of a written agreement. Proviso (a) to s. 92 of the Evidence Act 1950 is worth remembering. There it provides certain exceptions where, for instance, any fact may be proved which would invalidate a document such as fraud, illegality, intimidation, want of due execution, lack of capacity of any contracting party, failure of consideration and, finally, mistake of law or fact. It would be ideal to read the following cases:

(1) *Tan Chong & Sons Co (Sdn) Bhd v. Alan Mcknight* ([1983] 1 CLJ 77; [1983] CLJ (Rep) 394, FC;

(2) *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1983] 2 CLJ 187; [1983] CLJ (Rep) 186, FC;

(3) *Lee Soh Hua v. Kow Lup Piow & Ors* [1984] 2 CLJ 85; [1984] 1 CLJ (Rep) 191, FC; and

(4) *Tindok Besar Estate Sdn Bhd v. Tinjar Co.* [1979] 2 MLJ 229, FC.

Item 5.1 (v) of exh. P5 of the plaintiff's first affidavit as reproduced earlier is certainly a term of the contract which is critical to the operation of the contract. It is an express term in the contract and it is binding on the parties. Without that express term, the parties would probably not have entered into the contract in the first place. So, if there is a breach of such an express term, the consequences are certainly serious. It goes to the very heart of the matter. It goes to the root of the contract. Thus, the terms of a contract are generally classified as either conditions or warranties on the basis of their essentiality. This concept of essentiality was expounded by Jordan CJ in the case of *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd* [1938] 38 SR (NSW) 632 at 641 to 642 in this way:

> The question whether a term in a contract is a condition or a warranty, that is, an essential or non-essential promise depends upon the intention of the parties as appearing in or from the contract. The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and this ought to have been apparent to the promisor. If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight. If he contracted in reliance upon a substantial performance of the promise, any substantial breach will ordinarily justify a discharge.

Conditions too are considered major terms of the contract where breaches of those terms would render performance of the contract something substantially different from that which was agreed upon. Thus, if a condition is breached the innocent party is entitled to terminate the contract and can also sue for damages. It must be borne in mind that the entitlement to terminate performance stems from the fact that because the conditions are critical terms any breach of a condition will render the contract illusory. In short, the innocent party is entitled to bring the contract to an end in order to escape further obligation. A classic example would be the case of *Poussard v. Spiers and Pond* [1876] 1 QBD 410. In that case, a contract was entered into wherein Spiers and Pond engaged Poussard to sing and play the principal part in a new opera. The opera was scheduled to open on 28 November and Poussard attended rehearsals until 23 November when she was taken ill. On 25 November, finding that she would probably be unable to appear on opening night, Spiers and Pond engaged a

replacement on the terms that she would be ready if Poussard could not sing. On 4 December Poussard, having recovered, offered to sing but was refused. She sued for breach of contract. It was held that she should fail. It was also held that being there to sing was the essence of the contract as it went to the very root of the agreement. In not appearing Poussard had rendered the contract substantially different from that which had been agreed. Her promise to sing from the first night was a condition and its breach entitled the producers to repudiate the contract.

I will now turn to the concept of fundamental breach. The English Courts developed the idea that each contract contained some central obligation and its non-performance would constitute no performance of the contract as a whole. A breach of a fundamental term would be equivalent to non-performance of the contract. Lord Diplock in *Photo Production Ltd v. Securicor Ltd* [1980] AC 827 at 849 defined "fundamental breach" as "the failure by one party to perform a primary obligation (which) has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract".

Lord Abinger CB in *Chanter v. Hopkins* [1838] 4 M. & W. 399 at 404; 150 ER 1484 at 1487, stated, in style, the principles underlying both fundamental term and fundamental breach in this way:

> if a man offers to buy peas of another and he sends him beans, he does not perform his contract … the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it.

Likewise here the defendant expected the plaintiff to raise the EXIM loan, but the plaintiff failed to do so and it would be correct to say that the plaintiff had failed to keep to their end of the bargain. In short, the plaintiff failed to perform the contract.

The Plaintiff's Inconsistent Stand In Regard To The EXIM Loan

It seems to me that the plaintiff adopts a rather lackadaisical attitude towards the condition precedent of obtaining the EXIM loan. The plaintiff has not shown any consistency in their dealings with the defendant in regard to this condition. It must be recalled to mind that the proposal from the plaintiff was made in April 2000, while the letter of offer from the defendant bank was made in November 2000 and the security documents were executed in May 2001.

At best, it can be said that the plaintiff was approbating and reprobating on this issue. After being offered the EXIM loan as a mode of financing the balance of the said project in April 2000, the plaintiff in a letter dated 29 September 2000 suddenly offers a bond issue in substitution of the EXIM loan

condition. There is no evidence whatsoever to show that the defendant has accepted the bond issue as proposed by the plaintiff. In fact, it is a correct assertion to make and state that there is not a shred of evidence emanating from the plaintiff to show that the proposed substitution of the bond issue was indeed accepted by the defendant. What actually transpired was this. That the plaintiff proceeded to accept the letter of offer in November 2000 and execute the security documents in May 2001 agreeing to the original EXIM loan condition. As a bank the defendant has all along insisted that the plaintiff should raise the EXIM loan. Yet the plaintiff has the audacity to offer a bond issue in substitution thereof. No prudent bank would change its mind, so to speak, in midstream. All these clearly show and demonstrate that the plaintiff was trying to have its cake and eat it. While, on the one hand, the plaintiff has agreed on paper to the EXIM loan as a condition precedent yet, on the other hand, the plaintiff has the audacity to substitute it with a bond issue on a unilateral basis. It must be emphasised that the defendant has never agreed to such a substitution. So the germane question to pose now is this: should the defendant bank be faulted for insisting on the EXIM loan as a condition precedent? Certainly not.

The Failure Of The Plaintiff To Secure The Exim Loan

It is now apparent that the plaintiff has failed to secure the EXIM loan. Yet, the learned counsel for the plaintiff argues that the plaintiff had already met this condition. With respect, all the plaintiff can show is a letter of offer from an EXIM bank dated 11 August 1999 for a facility of not more than EURO 95.8 million. That letter of offer can be seen in exh. P5 to the plaintiff's first affidavit. That letter of offer is insufficient. It does not meet the requirement that the plaintiff should "secure" the EXIM loan. It must be nothing less than "securing" the EXIM loan. I repeat that all the plaintiff has shown is an offer letter and a conditional one at that. But despite the plaintiff exhibiting an acceptance of this offer, it is apparent from the letter dated 18 October 2001 from the EXIM loan financier themselves that even the EXIM loan financier was still not certain whether the facility was being accepted by the plaintiff. The letter from the EXIM loan financier as seen at exh. P15 to the plaintiff's first affidavit carries the message of uncertainty:

> As we have been informed by VAI (referring to Voest-Alpine Industrieanlagenbau GmbH) the project is proceeding well. In this connection, please let us know, whether or not your fine company intends to make use of the financing structure offered by WestLB.

It is also apparent from this very letter that the plaintiff has yet to pay the solicitors fees for the EXIM loan that was offered. This meant that the EXIM loan facility could not have been drawndown as yet. The third paragraph of that letter (see exh. P15 to the plaintiff's first affidavit) carries that solemn message of non-payment of the solicitors fees:

> Additionally, and after having received your payment of DEM 15.299.38, we would like to draw your attention to the fact that in respect to the invoice of Cliffort Chance amounting to DEM35,299.38, still DEM20.000 are overdue and payable. We highly appreciate receiving your money transfer to our account no: 300 500 00 with Landeszentralbank Duesseldorf quoting our reference '01-6919 eh/Tahan Steel/Acct. No: 9972000013'.

Going on an uphill task, the plaintiff makes much of the defendant's conveyancing solicitors' letter marked as exh. P7 to the plaintiff's first affidavit as seen at pp. 281 to 284. A careful reading of this letter would show that it does not in any way suggest that the plaintiff had met the condition precedents as set out in the security documents. As prudent solicitors, the defendant's conveyancing solicitors Messrs Mohamad Illiayas & Co merely confirmed that certain documents were in their possession and advised release of the redemption sum only subject to the following caveat (see the last paragraph of that letter at p. 284 of exh. P7 to the plaintiff's first affidavit):

> Subject to the fulfilment of all conditions, kindly let us have your payment of the redemption sum of RM46,116,596.07 in favour of Public Merchant Bank before 27th April 2001 for our further action.

The defendant's conveyancing solicitors in its letter does not make a value judgment on whether the plaintiff had met the EXIM loan condition or not and this very letter too is of no evidential value to the plaintiff to prove that it allegedly had met the EXIM loan condition.

The Plaintiff Is Said To Approbate And Reprobate

It must be recalled that the plaintiff never secured the EXIM loan at any time because the plaintiff was still approbating and reprobating. Notwithstanding the fact that the plaintiff had agreed that the EXIM loan is a condition precedent for the disbursal of the Al-Istisnaa' facility yet the plaintiff unilaterally decided to substitute the EXIM loan condition with a bond issue.

It is said that no one should approbate and reprobate (*Lissenden v. CAV Bosch Ltd* [1940] AC 412 at 417, 418, [1940] 1 All ER 425 at 429, HL; and *Harrison v. Wells* [1967] 1 QB 263 at 277, [1966] 3 All ER 524 at 530, CA). Flowing from this principle, two propositions may be advanced:

(1) a person who has a choice between two courses of conduct may make an election from which he cannot resile;

(2) a person will not be regarded as having made an election unless he has benefitted under it or by his course of conduct which he has first pursued is inconsistent with his subsequent conduct (*Banque des Marchands de Moscou (Koupetschesky) v. Kindersley* [1951] Ch 112 at 119, 120, [1950] 2 All ER 549 at 552; *Smith v. Baker* [1873] LR 8 CP 350; *Re Morton, ex p Robertson* [1875] LR 20 Eq 733; and *Evans v. Bartlam* [1937] AC 473 at 479, [1937] 2 All ER 646 at 649).

So much for the brief legal discourse. It is pertinent to note that as at October 2001, the plaintiff has yet to secure the EXIM loan. This is not surprising at all because on 19 October 2001 the plaintiff was still raising the issue of substituting the EXIM loan with a local bond issue. But on 23 October 2001, the plaintiff suddenly reverted to the EXIM loan issue when asked by the defendant to clarify as to the EXIM loan condition. In exh. P12 to the plaintiff's first affidavit, the plaintiff suddenly appears to revert back to the EXIM loan.

The defendant has been very accommodative. In order to accommodate the plaintiff, the defendant although not obliged to accept the unilateral change by the plaintiff from the EXIM loan to a bond issue, requested for further security. In its letter addressed to the plaintiff dated 18 April 2002 as seen in exh. P16 to the plaintiff's first affidavit, the defendant puts it in this way:

> We wish to inform you that the Bank has approved your request for a further drawdown of the facility amounting to RM30,414,061.05 only, subject to the followings:
>
> 1. The Bank's representative must be allowed to attend the Board meeting of TSC (referring to the plaintiff);
>
> 2. TSC (referring to the plaintiff) is required to submit a monthly progress report of the steel mill project;
>
> 3. Any future drawdown of the facility is to be certified by Messrs Ranhill Bersekutu Sdn Bhd ("RBSB") or any other consultant acceptable to us; (and)
>
> 4. Alliance Merchant Bank is to issue a letter confirming the availability of the RM375 million bond issuance under a "bought deal" arrangement.
>
> If the above terms and conditions are acceptable to you, kindly indicate your acceptance by signing and returning to us the duplicate copy of this letter not later than seven (7) days from the date of this letter. Thereafter, the Bank shall at its discretion treat this offer as having lapsed and cancelled or the Bank may extend the time of acceptance for such period as it deems fit.

But the plaintiff did not sign nor return the duplicate copy of the above mentioned letter. What a pity.

It seems that the defendant requested the additional conditions in order to ensure that the plaintiff would be in a position to repay the Al-Istisnaa' facility. It is the submission of the defendant's counsel that the defendant was contractually well entitled to demand the additional conditions since it was the plaintiff itself which was requesting for a variation of the conditions precedent.

It is my view that the so called "serious issues to be tried" canvassed by the plaintiff are in fact non issues. It should be resolved at this stage without the necessity of a full trial as it can be resolved based on the available documentary evidence. The allegations raised by the plaintiff may be categorised into two issues. Firstly, it is an issue in regard to the variation of the contract, namely, whether the written contract between the plaintiff and the defendant has been varied. Secondly, whether there has been any waiver of the provisions of the written contract and if so, whether the defendant is entitled to insist on the strict compliance of the same at any time. I will now deal with these two issues in quick succession.

Variation Of The Contract

In the plaintiff's second affidavit as seen in encl. 10, the plaintiff takes a belligerent attitude in regard to the alleged substitution of the EXIM loan condition for a local bond issue. The plaintiff appears to be of the view that they are entitled to as they wish without the express written consent of the defendant. The plaintiff strives to argue and did argue that the defendant by mere omission has agreed to the substitution of the EXIM loan condition for a local bond issue. With due respect, such an attitude is misconceived in the light of the pre-existing express contractual relationship between the plaintiff and the defendant. This is not a case of a simple retail transaction. It involves a sum amounting to RM97 million which by any stretch of imagination cannot be said to be a small sum of money. A study of the express written agreement is called for before one can say whether a mere omission on the part of the defendant can be held as constituting agreement to a variation of the contract between the parties.

In law, it is not enough to say that it would be reasonable to make a particular implication (*Reigate v. Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592; *British Movietonews Ltd v. London and District Cinemas Ltd* [1952] AC 166, [1951] 2 All ER 617, HL; *Adamastos Shipping Co Ltd v. Anglo Saxon Petroleum Co Ltd* [1959] AC 133 at 174, [1958] 1 All ER 725 at 744, HL; and *Causton v. Mann Egerton (Johnsons) Ltd* [1974] 1 All ER 453, [1974] 1 WLR 162, CA). It is also not enough to say that it would make the carrying

out of the contract to be more convenient (*Russell v. Duke of Norfolk* [1949] 1 All ER 109, CA). Neither is it enough to say that it is consistent with the express provisions of the contract or with the intentions of the parties as gathered and culled from those provisions (*F.A. Tamplin SS Co Ltd v. Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 at 422, HL). A term too will not be implied where a contract is said to be effective without the proposed term (*Consolidated Goldfields of South Africa Ltd v. E. Spiegel & Co* [1909] 25 TLR 275 at 277; *Re Nott and Cardiff Corpn* [1918] 2 KB 146 at 168, CA; and *Brodie v. Cardiff Corpn* [1919] AC 337, HL, as well as the case of *L. French & Co. v. Leeston Shipping Co* [1922] 1 AC 451, HL).

It is also pertinent to mention that whether a term will be implied is a question of law for the court to decide. And there is no discretion whatsoever to create a new contract. The court will be reluctant to imply a term that will contradict any express term (*General Publicity Services Ltd v. Best's Brewery Co. Ltd* [1951] 2 TLR 875, CA; *Miller v. Emcer Products Ltd* [1956] Ch 304, [1956] 1 All ER 237, CA; *Lynch v. Thorne* [1956] 1 All ER 744, [1956] 1 WLR 303, CA; and *Baldry v. Marshall* [1925] 1 KB 260, CA). In a case where the contract contains an express obligation by a party, it is for that party to show that there is some implied term which qualifies the obligation (*General Publicity Services Ltd v. Best's Brewery Co Ltd (supra)*).

For starters it would be ideal to refer to cl. 8.9 of the Al-Istisnaa' sale agreement as seen in exh. P5 at p. 173 of the plaintiff's first affidavit which states as follows:

> No amendment, modification, termination or waiver of any provision of the security documents nor consent to any departure by the customer therefrom shall be effective unless the same shall be in writing and signed or executed by the bank and then any such waiver or consent shall be effective only in the specific purpose for which it was given. No notice to or demand on the customer in any case shall entitle the customer to any other notice or demand in similar or other circumstances.

And it is clear as crystal that the plaintiff is not entitled to depart from the requirement of the EXIM loan condition without the written and signed consent of the defendant. There is not a single piece of evidence to show that the defendant had agreed in writing to vary the contract and I have no discretion, at all, to create a new contract (*Mills v. Dunham* [1891] 1 Ch 576 at 580, CA).

The closest the plaintiff comes to showing that the defendant had "agreed" to the substitution of the EXIM loan condition with a local bond issue is the letter at exh. P16 of the plaintiff's first affidavit which has been reproduced earlier. A closer examination of exh. P16 shows that the defendant was merely stating

its agreement to accept a local bond issue provided that the plaintiff was willing to meet certain conditions, namely, that the local bond issue should be on a bought deal basis. But the plaintiff had failed to meet the conditions as set out by the defendant. What then is meant by a "bought deal basis"? It is a term used in corporate finance which means that the underwriting merchant bank for the bond issue had already "placed" the bonds before they are even issued. This means that immediately upon the issuance of the bond, they are immediately taken up or bought by identified subscribers. There is therefore no danger of the bonds not being subscribed to. This condition was said to be important to the defendant because it would ensure that the local bond issue would in fact raise the necessary financing required to substitute the original financing channel of the EXIM loan. One may pose this question: Is the defendant entitled to impose "new" conditions? The answer is in the positive. Now, since it is the plaintiff that wishes to change the terms of the pre-existing contractual relationship then the defendant is entitled to either accept such a change or to reject such changes or to accept those changes subject to any new terms it may wish to add. The plaintiff then has the choice to either accept those conditions which means that the variation of the pre-existing contract would become effective or reject those changes and revert to the original terms of the pre-existing contract.

Be that as it may, it must be stressed that the plaintiff is not entitled to vary the contract unilaterally. In *Mega Air Conditioning Sdn Bhd v. Speedfam Co Ltd* [2001] 4 CLJ 261, the Court of Appeal sets out the law in erudite terms. Mohd Noor Ahmad JCA (now FCJ) speaking for the Court of Appeal aptly said of the report:

> The pertinent question is whether the plaintiff was entitled to charge the defendant for the foc just because earlier the defendant changed its mind to use the RS232 cable? To my mind, the plaintiff was not entitled to do so because, firstly, the foc was packaged in the contract price and secondly, the defendant finally agreed to use the foc on the plaintiff's advice. The plaintiff's conduct was tantamount to unilateral variation of the contracts and therefore, the plaintiff was in breach of contract which entitled the defendant to rescind the contracts.

At p. 327 of the report, the learned judge of the Court of Appeal stated the law in this way:

> The general rule is that a party to a contract must perform exactly what he undertook to do (*Chitty on Contracts* (26th Ed) Vol 1 para 1991). It is not open to the courts to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them with what the courts think the parties ought to have intended (para 827).

Mega Air Conditioning Sdn Bhd is a case analogous to the present case at hand. Here, the plaintiff is supposed to provide proof that they have secured the EXIM loan. This, the plaintiff did not do. Upon the plaintiff's application to vary the terms of the contract, the defendant insisted on certain conditions. The plaintiff had the choice of accepting such conditions upon which the contract would be mutually varied or the plaintiff could revert to the original EXIM loan condition. Instead the plaintiff chose to assume that they are entitled to a unilateral variation of the contract. This simply means that it is the plaintiff who has breached the contract and not the defendant.

The courts have always been strict in interpreting clauses in relation to variation. In *Multi-Purpose Bank Bhd v. Maimoon bte Abdul Razak* [1999] 3 CLJ 21, the court adopted a strict approach. At p. 24 of the report, the learned judge aptly said:

> There is a great difference between the rates of interest and the factor relied on to calculate such rates. A change of either one of these can substantially alter any calculation. Though clause 5(a) of the annexure allows the plaintiff to arbitrarily vary the interest, it is certainly restricted only to 'the rate of interest' as the clause declares. There is no reference made herein to allow the variation of the factor of computing such rate. Though I noticed that clause 1(B)(i)(a) of the annexure carries the words 'be varied and substituted' which may imply a wider meaning to include the factor of calculating the rate of interest, this is dependent on 'the manner hereinafter provided' as the sentence continues. And what is the manner hereinafter provided? To my reading of the annexure, it must be associated with clause 5(a). And as I have explained above, this provision (clause 5(a)) is only of limited application.

I am not willing to condone the plaintiff's relaxed attitude in relation to the variation of a condition precedent of the written agreement between the plaintiff and the defendant. A party is not entitled to unilaterally vary a contract and then found a cause of action for breach of contract against the other party based on that unilateral variation. This goes against the prevailing law in this country.

It follows therefore that the defendant was within its rights to refuse to allow the disbursal of the third tranche of the facility to the plaintiff since the plaintiff has by their own admission failed to secure the EXIM loan. There is no legal duty on the part of the defendant to release any portion of the Al-Istisnaa' facility. The plaintiff cannot and should not now be heard to say that it has been wronged by the defendant when in the first place the plaintiff had not complied with its part of the bargain.

Waiver By The Defendant

The plaintiff has made much of the fact that the defendant had in fact disbursed the first and second tranches of the facility to the plaintiff even though the EXIM loan condition had not been fulfilled to the core. At this juncture, it is ideal to gauge the defendant's conduct by referring to the agreed written agreements between the parties. Two clauses to the Al-Istisnaa' purchase agreement must be referred to and they would be cls. 5.3, and 7.1. In addition to that, cls. 8.3 and 8.8. of the Al-Istisnaa' sale agreement should also be referred to and I shall now reproduce them in verbatim:

5.3 **Waiver of Conditions**

It is hereby expressly acknowledged and declared that the conditions hereinbefore contained are inserted for the sole benefit of the Bank and may therefore be waived wholly or in part by the Bank at the sole and absolute discretion of the Bank without prejudicing the rights of the Bank under any document entered into between the Bank and or any of the Security Parties and such waiver shall not prejudice the rights of the Bank from insisting on its compliance with any such waived conditions at any subsequent time.

7.1 **Waiver**

No relaxation, forbearance, indulgence, failure or delay on the part of the Bank in exercising nor any omission to exercise any right, power, privilege or remedy accruing to the Bank under the Security Documents upon any default on the part of any of the Security Parties shall impair any such right, power, privilege or remedy or be construed as a waiver thereof or an acquiescence in any default affect or impair any right, power, privilege or remedy of the Bank in respect of any other or subsequent default nor shall any single or partial exercise of any right or remedy prevent any further or other exercise thereof or the exercise of any other right or remedy. The rights and remedies herein provided are cumulative and not exclusive of any other rights or remedies provided by law.

8.3 **Waiver**

No relaxation, forbearance, indulgence, failure or delay on the part of the Bank in exercising nor any omission to exercise any right, power, privilege or remedy accruing to the Bank under the Security Documents, or any security in favour of the Bank upon any default on the part of the Customer shall impair any such right, power, privilege or remedy or be construed as a waiver thereof or an acquiescence in any default affect or impair any right, power, privilege or remedy of the Bank in respect of any other or subsequent default nor shall any single or partial

exercise of any right or remedy prevent any further or other exercise thereof or the exercise of any other right or remedy. The rights and remedies herein provided are cumulative and not exclusive of any other right or remedy provided by law.

8.8 **Indulgence**

The liability and obligations of the Customer shall not be impaired or discharged by reason of any time forbearance or other indulgence being granted by or with the consent of the Bank to the Customer or to any person who or which may be in any way liable to pay any of the monies secured by the Security Documents or by any other security in favour of the Bank or by reason of any arrangement being entered into or composition accepted by the Bank modifying the operation of law or otherwise the rights and remedies of the Bank under the provisions of the Security Documents.

Now, cl. 5.3 of the Al-Istisnaa' purchase agreement is commonly referred to as the "waiver" clause. It is a clause which is not devoid of meaning. It is a clause designed specifically for the situation which is confronting this court at this point of time. Can the plaintiff really insist that merely because the defendant did not insist on the strict compliance of the EXIM loan condition at the time of disbursal of the first and second tranches of the facility that the defendant cannot now resort to it again? The very existence of the waiver clause must be construed in favour of the defendant. The defendant is entitled to insist on the strict compliance of any or all of the conditions in the Al-Istisnaa' sale agreement notwithstanding the disbursal of the first and the second tranches of the facility.

The critical difference in law between variation and waiver is this. A variation involves a formal alteration to the terms of the original contract whereas a waiver only involves one party not insisting upon those terms being strictly performed. Since a waiver does not involve any alteration to rights, the terms of the original contract remain unchanged. From the authorities the following principles in order to identify a waiver may be itemised as follows:

(1) the alteration is usually pertaining to the rights of only one party;

(2) the alteration benefits only one party and it often occurs at the request of that party;

(3) the alteration in question does not substantially change either the terms or the operation of the contract; and

(4) the alteration is freely agreed upon.

This brings to mind the case of *Charles Rickards Ltd v. Oppenhaim* [1950] 1 KB 616. In that case *Oppenhaim* engaged *Rickards* to construct a Rolls Royce car body. The work which was to be finished by March was not completed on time. *Oppenhaim* continued to press for delivery thereby impliedly waiving the condition regarding the delivery date. Eventually, in June, he wrote demanding delivery by late July indicating that, otherwise, he would not accept the body at all. Finally, delivery was made in October. *Oppenhaim* refused to accept it. *Rickards* sued. The court refused *Rickards*'s claim and *Rickards* failed in their action. The court held that even though *Oppenhaim* had originally waived his right to reject the body for non-delivery, he had revived that right by his June letter by giving *Rickards* reasonable notice that delivery was to be made no later than 25 July. By failing to deliver until October, *Rickards* was in breach thereby entitling *Oppenhaim* to refuse delivery.

Here, the existence of the waiver clause gives leverage to the defendant. The defendant is certainly entitled to insist on strict compliance with the Al-Istisnaa' facility agreements. It must be emphasised that the defendant's legal duty to release any portion of the facility has not been disputed. However, the plaintiff cannot and should not now be heard to say that it has been wronged when in fact it never complied with its part of the bargain.

The Balance Of Convenience Test

In the *Keet Gerald Francis* case, the Court of Appeal laid down the law in this way (see p. 306 of the report):

> In making his assessment, he must take into account all relevant matters including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him.

And using this passage as a leverage, the defendant submits through its learned counsel that the defendant has rightfully withheld further disbursal of the Al-Istisnaa' facility to the plaintiff. In short, the defendant has acted within the law.

It is also the submission of the defendant that the plaintiff has defaulted in its agreed obligation to the defendant even before the defendant's purported rescission of the contract. The plaintiff's default relates to the fact that the plaintiff had stopped making payment on the facility from as early as 31 January 2002 when the defendant had to liquidate a security cash deposit of RM1 million to enable the plaintiff to settle the instalments that were due from the plaintiff. This is clearly evident from the letter dated 11 November 2002 from the defendant to the plaintiff as seen in exh. P18 to the plaintiff's

first affidavit. That very letter is the damning feature of this case. It shows clearly that the security cash deposit had to be encashed on 31 January 2002 to enable the defendant bank to settle the plaintiff's third quarterly payment. Thereafter the plaintiff made no further payment thereby causing the next instalment to be in arrears.

It must be borne in mind that encashing a security deposit means that the plaintiff is already in default of its instalment payment. Clause 2 of the memorandum of deposit of investment account certificate by way of security dated 14 May 2001 as seen in exh. "P6" to the plaintiff's first affidavit clearly sets out the obligation on the part of the plaintiff to:

> … continue to deposit the deposit sum with you during the continuance of this security and to do all acts deeds and things including the execution and signing for such notices endorsements and documents as may be required for the continuance of the deposit and the security.

Factually speaking, by allowing the security cash deposit to be liquidated without ensuring that such sum remains in the security deposit with the defendant entails a breach of the security documents on the part of the plaintiff. It appears to me that the plaintiff's rescission of the agreement with the defendant was timed conveniently with its inability to continue servicing the Al-Istisnaa' facility. So, bearing all these facts in mind, the question to be posed would be in this fashion: would the plaintiff suffer if an injunction is not granted to them? I would, with respect, answer this question in the negative. It is clear as daylight that the plaintiff will be unable to maintain the said project even if the injunction is granted to them. It must be borne in mind that the defendant's facility is only a small portion of the total financing required for the successful completion of the said project. If the plaintiff cannot even service the defendant's facility, how could the plaintiff service any EXIM loan which it would have to have for the successful completion of the said project. So it can be surmised that in not granting the plaintiff an injunction would put them in no worse financial position than they already are. Another question to pose would be this: would granting an injunction assist the plaintiff in completing the said project? The answer is in the negative. By way of a reiteration it is germane to state that the plaintiff cannot even service the small facility granted by the defendant and the plaintiff is unlikely to be able to service a large EXIM loan. That would be wishful thinking on the part of the plaintiff.

Will The Defendant Suffer Irrecoverable Damages?

I would answer this question in the positive. It must be recalled that the defendant is a licensed Islamic Bank governed by the Islamic Banking Act 1983 and is regulated by Bank Negara Malaysia – the Central Bank of Malaysia. It is not allowed to participate nor to conduct any business that contravenes the Syariah unlike a conventional bank. The defendant does not charge penalty interest by whatever name one wishes to call it for late payment. Every single instalment that is paid late to the defendant is a loss of use of money owed to the defendant for the period of delay. The defendant has been losing and continue to lose the use of its instalments since 31 January 2002. Whilst this may not appear to be a significant loss it is still a loss for which the defendant cannot be compensated. Viewed in this context, the grant of an injunction to the plaintiff would cause irreparable damage to the defendant. Moreover, the strict Islamic banking system as alluded to in the beginning of this judgment mirrors the unenviable position of the defendant bank. This is the crucial factor that differentiates this case from the rest. It is not the run of the mill type of cases.

The Plaintiff's Inability To Satisfy Its Undertaking As To Damages

The Court of Appeal in *Keet Gerald Francis* case also sounded a warning that even if on the balance it appears that the plaintiff ought to be granted an injunction, the judge should be satisfied that the plaintiff is in a financial position to meet his undertaking as to damages.

Shankar J (as he then was) in *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] 1 MLJ 426 pointed out that an undertaking as to damages must not be a barren one.

In *TSC Education Sdn Bhd v. Kolej Yayasan Pelajaran MARA & Anor* [2002] 2 CLJ 581, I had this to say:

> What is the real purpose of an undertaking as to damages? It is simply to vest the court with the jurisdiction to make an appropriate order to recompense the loss suffered by the party who was restrained when it is subsequently established that the applicant was not entitled, in the first place, to the injunction. It is always possible that a wrong decision would be made at the interlocutory stage.

The case of *Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Berhad & 2 Ors* [2002] 2 CLJ 758 is yet another example of a case where an injunction was refused, *inter alia*, on the inability of the plaintiff to satisfy any undertaking in damages since the plaintiff was unable to even pay his existing debts. Likewise here, the plaintiff is unable to replenish the security cash deposit of RM1 million.

I must proceed further and I must pose the following question. What evidence has the plaintiff shown as to its ability to satisfy any damages? It has shown its audited accounts for the year ending 31 December 2000 only. It does not show the audited accounts for the year ending 31 December 2001 or 31 December 2002. The omission is obvious. The audited accounts for the year ending 31 December 2000 shows a rosy financial position of the plaintiff whereas the current audited accounts probably would not reflect a rosy picture. All is not well. A scrutiny of the audited accounts for the year ending 31 December 2000 would show a healthy financial balance because under caption of "Property Plant and Equipment" a sum of RM181,077,395 is reflected. But this sum is inclusive of the land that has already been charged to the defendant. Again the figure of RM181,077,395 is inclusive of the sum of RM62,925,664 which is for the "Plant and Machinery Under Construction". It must be recalled that since the plaintiff has admitted that the construction has been abandoned, then the value of the "Plant and Machinery Under Construction" is now seriously in doubt. It must also be borne in mind that the assets of the plaintiff available for satisfaction of the undertaking as to damages would only be available subject to the charge and debenture held by the defendant for the facility sum of RM97 million together with the profits thereto which is listed under the Al-Istisnaa' sale agreement to be in the sum of RM185,360,000. It cannot be denied and it is acknowledged by the defendant that some part of the facility had been repaid and so the balance sale price under the Al-Istisnaa' sale agreement is only in the sum of RM143,590,488.09 as reflected in exh. "P19" to the plaintiff's first affidavit. Notwithstanding all these, a big question mark still prevails as to the plaintiff's ability to satisfy any damages that may be awarded to the defendant in the event that after trial this court finds that the injunction should not have been granted in the first place.

It is a contradiction in terms when the plaintiff says that it is in a healthy financial position. The plaintiff admits that it is a "single purpose vehicle" incorporated for the sole purpose of carrying out the said project. If as the plaintiff contends that it has suffered much damage and will not be able to carry out the said project, and if as the defendant contends that it has lawfully withheld the disbursal of the balance of the Al-Istisnaa' facility, then it is crystal clear that the plaintiff company will not be able to even repay the facility amount. After all, as alluded to in the early part of this judgment, the said land which forms the main security is only valued at RM128 million and this sum is not even sufficient to settle the outstanding sale price. By comparison, the defendant's counterclaim is colossal. It is in the sum of RM143,590,488.09. So it can be surmised that the inability of the plaintiff to demonstrate its ability to satisfy any undertaking as to damages alone should militate against this court

from exercising its discretion in favour of the plaintiff in granting the injunction prayed for. The defendant, on the other hand, being a licensed Islamic Bank has to maintain statutory reserves with Bank Negara Malaysia – the Central Bank of Malaysia, and this makes the defendant a financially strong entity as compared to the plaintiff. The defendant's ability to satisfy any judgment that may eventually be obtained by the plaintiff can never be doubted. But whether the plaintiff would succeed, at the end of the day, is yet to be seen.

The Discretionary Test

In *Keet Gerald Francis*, the Court of Appeal explains this test in this way (see p. 306 of the report):

> Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account.

The primary consideration that comes to the forefront would be in regard to the adequacy of damages. The plaintiff being a self admitted single purpose vehicle has profit as its sole objective. Damages would thus be the appropriate remedy for the plaintiff. There can be no other consideration. The plaintiff did not and does not exist for any other purpose. It exists to carry out the said project for profit and nothing else. There is no other prior reputation to speak of. Even the reputation of the shareholders or the parent company of the plaintiff is not in issue here. They are not parties to this litigation.

Even if the injunction is not granted at this juncture and this court finds, at a later stage, that the defendant was in breach of the contract, an award of damages at that point of time should certainly satisfy the plaintiff. And even if the defendant exercises its right to foreclose on the primary security, namely, the said land on which the said project is being constructed, damages would still be an adequate remedy to the plaintiff. This is because the value of the said land revolves on money – mere dollars and cents. It is the law that commercial or industrial land – just like the said land, has no special or sentimental value to its owners. In *Univein Sdn Bhd v. Malaysia Building Society Berhad* [2003] 2 CLJ 514, the Court of Appeal said that:

> The respondents had therefore been right in saying in paragraph 17 of their affidavit in reply that the lands were commercial property of no sentimental value to the appellants.

In the present case, the plaintiff has not shown any special value of the said land charged to the defendant except to say its usefulness as a site to carry out the said project. I venture to say that even if the said project cannot be carried out on the said land, the said project may still be carried out on another suitably acquired land at the expense of the defendant in the event that this court finds that the defendant had wrongfully withheld the disbursal of the balance of the Al-Istisnaa' facility at the trial proper.

Public Policy In The Context Of The Islamic Corporate Financing

Next, I will consider the question of public policy to the effect that an injunction against the defendant would impede the Islamic corporate financing. I am certainly entitled to consider this all pervading issue. Now, it is against public policy for the courts to interfere with the dealings of commercial men by preventing a lender from exercising its rights to its security for a facility especially where the borrower is not a man on the street but rather a large commercial entity with its requisite advisers. If the courts are quick to intervene, lenders like the defendant would shy away from lending to large commercial borrowers who are more likely to have the ability and the clot to run to the courts to seek such a remedy and instead spread their risk with smaller lending to the ordinary man on the street. Here, the defendant as the lender being an institution operating under the Islamic banking principles would be made to suffer loss of use of its money by the delay in recovering monies from the plaintiff in the event that this court ultimately decides that the injunction should not have been granted. This loss cannot be compensated by the courts since the defendant is prevented by its strict adherence to Islamic banking principles from taking any penalty interest which would be in the nature of usury. Abdullah Yusuf Ali in his book *"The Holy Qur'an"*, Text Translation and Commentary at p. 115 carries Surah 2: 275 Al Baqarah which states:

> Those who devour usury
> Will not stand except
> As stands one whom
> The Evil One by his touch
> Hath driven to madness.
> That is because they say:
> 'Trade is like usury,
> But Allah hath permitted trade
> And forbidden usury.
> Those who after receiving
> Direction from their Lord,
> Desist, shall be pardoned
> For the past; their case

Is for Allah (to judge);

But those who repeat
(The offence) are Companions
Of the Fire; they will
Abide therein (forever).

And at Surah 2: 276 Al Baqarah:

Allah will deprive
Usury of all blessing,
But will give increase
For deeds of charity;
For He Loveth not
Creatures ungrateful
And Wicked.

On "usury", Abdullah Yusuf Ali commented in the same book at the footnote to p. 115 in these words:

> Usury is condemned and prohibited in the strongest possible terms. There can be no question about the prohibition. When we come to the definition of usury there is room for difference of opinion. Umar, according to Ibn Kathir, felt some difficulty in the matter, as the Prophet left this world before the details of the question were settled. This was one of the three questions on which he wished he had had more light from the Prophet, the other two being Khilafah and Kalalah (see 4: 12, n.518). Our Ulama, ancient and modern, have worked out a great body of literature on usury, based mainly on economic conditions as they existed at the rise of Islam.

Be that as it may, a negative precedent emanating from this court would not bode well for Islamic banking in this country which intends to develop the Islamic banking sector as a model for the world to see and emulate. The current Prime Minister YAB Dato' Seri Abdullah Hj Ahmad Badawi delivered a speech based on his article entitled "*The Islamic Economic Principle – Concept & Practice*" which he delivered on 26 October 2001 in his capacity as the Deputy Prime Minister during the official launching of the first Islamic Banking & Takaful Week (IBTW 2001) at the Islamic Arts Museum, Kuala Lumpur and this was what he said and wrote (courtesy of the Central Bank of Malaysia and made available on request):

> We hope that as we enter this new millennium, Islamic civilisation will be able to emulate some of its past successes. We are already witnessing a gradual increase in the share of Islamic financial activities as a proportion of the total global financial system. This increase in wealth and assets placed and managed by Muslim bankers can be utilised through refinancing to reduce the debt burden of Islamic countries and enhance the prosperity of the ummah.

Muslims around the world must develop a cooperative framework to promote Islamic banking, particularly in mobilising financial resources to meet the needs of the ummah in different parts of the world. This ties in well with the international efforts to establish an international Islamic financial system which will link the Islamic financial markets around the world. And with the proposed setting-up of the Islamic financial services organisation, or IFSO, we hope to see a more comprehensive supervisory and prudential framework to oversee the profit-sharing arrangements undertaken by the Islamic financial institutions.

Malaysia is committed to the development of both global initiatives. Our concerted efforts to complete the global Islamic financial architecture, as well as to implement the noble principle of profit-sharing in Islamic banking, will be important and significant gifts to the Islamic world.

Now, since injunctions are a discretionary remedy, the plaintiff must come to this court with clean hands for he who comes to equity must come with clean hands. This maxim seems to be related to the *ex turpi causa non oritur actio* of the common law. This maxim looks to the past rather than to the future. The plaintiff must be prepared to do what is right and fair. The plaintiff must show that its past record in the transaction is clean because "he who has committed Iniquity ... shall not have Equity" (*Jones v. Lenthal* [1669] 1 Ch. Cas. 154). But, "Equity does not demand that its suitors shall have led blameless lives" (per Brandeis J in *Loughran v. Loughran* [1934] 292 U.S. 216 at 229). However, what actually bars the claim is not in relation to the general depravity but rather one which has "an immediate and necessary relation to the equity sued for" (*Dering v. Earl of Winchelsea* [1787] 1 Cox Eq. 318 at 319, 320; *Moody v. Cox* [1917] 2 Ch. 71 at 87; and *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302 at 332). In the present case, the plaintiff has failed to inform this court that they were already in breach of the Al-Istisnaa' sale agreement by being in default of payment of the third quarterly payment for which the defendant was forced to encash the security cash deposit of RM1 million held by the defendant as a security. The third quarterly payment was due on 3 February 2002 and this is evident from the letter dated 11 November 2002 from the defendant to the plaintiff which is exh. "P18" to the plaintiff's first affidavit. It should be borne in mind that the plaintiff only purported to repudiate the Al-Istisnaa' facility granted by the defendant on 26 April 2002 (see exh. "P17" to the plaintiff's first affidavit) after the plaintiff had already been in breach of its obligations under the said facility. Notwithstanding the presence of the pertinent exhibits, the deponent of the plaintiff's second affidavit in encl. 10 sees it fit to maintain that the plaintiff did not breach the terms of the Al-Istisnaa' facility and that in fact the plaintiff had overpaid the defendant. These averments cannot be true unless the plaintiff is allowed to argue that

monies held as a security deposit must be deemed payment to the defendant. In these circumstances, this court must certainly be slow to aid a party who, being in breach itself, attempts to obtain an injunction against a defendant who simply wishes to exercise its securities to recover the monies owed to it. The threat of an impending breach is equated to "unclean hands" in the case of *Tan Sri Dato' Tajuddin Ramli (supra)* and there the court said:

> The threat or distinct probability of an impending breach of contract by an applicant for the interim injunctive relief may be material consideration especially if same is averred to but not rebutted in opposing affidavits. This consideration is material as the court should avoid finding itself in the invidious position of bearing witness to a blatant breach of the subject contract by the applicant soon after granting the interim injunction.

Here, there is more than an impending breach. Here, there is a pre-existing breach on the part of the plaintiff and for that reason this court will not come to the aid of the plaintiff.

Conclusion

This is a rather long judgment. All the major issues have been considered in this judgment. I must, for all these reasons, dismiss the plaintiff's application in encl. 2 with costs.